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JOSEPH F. SPANIOL, CLERK

Nos. 87-2050, 88-90, and 88-96

In the Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, ET AL., PETITIONERS,

v.

AMERICAN CIVIL LIBERTIES UNION,
GREATER PITTSBURGH CHAPTER, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS COUNTY OF ALLEGHENY AND CITY OF PITTSBURGH

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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1. PETITIONERS' DISPLAYS ARE NOT COERCIVE AND THEREFORE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Although respondents devote many pages to their efforts to distinguish this case from *Lynch v. Donnelly*, 465 U.S. 668 (1984), they disregard almost entirely the fundamental similarity that, in our view, should be dispositive. Like the display approved in *Lynch*, petitioners' holiday displays are wholly passive and non-coercive in nature. Accordingly, they do not "establish" either a specific religious denomination or religion in general, within the meaning of the Establishment Clause of the First Amendment. The historical origins of the Establishment Clause strongly support this position, and this

Court has recognized the importance of the historical evidence in understanding "what the draftsmen intended the Establishment Clause to mean." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

The Establishment Clause was intended to remove the threat of religious coercion and persecution resulting from a governmentally established official religion. The purpose of the clause was, in the words of James Madison, that "Congress should not *establish* a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730 (J. Gales ed. 1834) (August 15, 1789) (emphasis supplied). Madison explained that "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." *Id.* at 731 (emphasis supplied). Madison thus echoed the theme that he had sounded several years earlier in his 1785 Memorial and Remonstrance against Religious Assessments, a vigorous opposition to proposed Virginia legislation that would have established a tax for the support of teachers of the Christian religion. Quoting the 1776 Virginia Declaration of Rights, Madison wrote in the Memorial and Remonstrance that religion "can be directed only by reason and conviction, not by force or violence." He warned "[t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]" Memorial and Remonstrance ¶ 3, reprinted in *Everson v. Board of Education*, 330 U.S. 1, 65-66 (1947) (appendix to dissenting opinion of Rutledge, J.).

The concept of coercion or compulsion, either direct or through the power of the purse, was central in the minds of the Framers. *See generally* McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev.

933 (1986). This point is further confirmed by the historical background against which the First Amendment's prohibition against "law[s] respecting an establishment of religion" was adopted.

On the eve of the American revolution, most of the colonies maintained establishments of religion, *i.e.*, state endorsed and supported churches coupled with officially sanctioned discrimination, of varying degrees of severity, against those holding dissenting views. One scholar reports, for example, that "Massachusetts imprisoned Baptists and any others who refused obedience to the government in matters of support for religion." L. Levy, *The Establishment Clause* 2 (1986). Virginia too regarded certain Baptist conduct as criminal. *Id.* at 3. Taxes were levied to support the clergy, and test oaths of varying kinds remained a condition for public office in most jurisdictions. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 852-853 (1986). Although by the time the First Congress met to consider adoption of the Bill of Rights, members of nonestablished sects were frequently relieved of the obligation to support the adopted religion, dissenters were required to pay for clergy or teachers of their own religious persuasion. *Id.* at 853.

The historical evidence leaves little doubt that the Establishment Clause was intended to prohibit state coercion of support for religion, either through direct legal compulsion or through taxation or the use of public funds. Although language in some of this Court's decisions suggests that some non-coercive governmental action also may violate the Establishment Clause, the historical basis for those remarks is problematical at best.

This Court's first suggestion that the Establishment Clause may be violated even in the absence of governmental coercion was dictum in *Engel v. Vitale*, 370 U.S. 421, 430 (1962). In that case, the Court said, without

citation of authority, that coercion is not a necessary element of an Establishment Clause violation, but the Court quickly went on to add that "[t]his is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals." *Id.* at 430-431. Because the Court found actual coercion in the school prayer context of *Engel*, the Court's comment on the significance or lack of significance of direct governmental compulsion was unnecessary to the Court's decision.

Other cases asserting the insignificance of the absence of coercion, such as *Committee for Public Education v. Nyquist*, 413 U.S. 756, 786 (1973), in fact involved the validity of statutorily mandated expenditures of public tax funds to aid religious schools. This kind of financial coercion was just as abhorrent to the Framers as physical compulsion.

Even if governmental coercion is not a prerequisite for a finding of an Establishment Clause violation, the purpose and history of the Clause show that coercion, or the lack thereof, is the single most important element of the analysis. In *Lynch*, this Court specifically recognized that the non-coercive nature of the creche display was a factor that mitigated strongly against any finding that the display operated impermissibly to advance religion. The Court stated (465 U.S. at 686):

> To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.

See also Zorach v. Clauson, 343 U.S. 306, 311 (1952) (in sustaining the New York "released time" program against constitutional attack, the Court explained: "There

is a suggestion that the system involves the use of coercion . . . . There is no evidence in the record before us that supports that conclusion. . . . If in fact coercion were used, . . . a wholly different case would be presented").

The Pittsburgh displays are clearly passive and non-coercive. As the district court found, "none of the people who enter the Courthouse are required to do anything; they are not required to read, or to sing, or to pause or to reflect. Neither are people required to pause or look or read or make any gestures where the menorah is concerned; they are merely displays" (J.A. 9). If the creche or menorah gives offense to anyone, that person is free to ignore or avoid it. Because the display is passive in nature, it does not command action or obedience; unwilling observers may simply turn away or avert their eyes.

Respondents argue that those who are required to be present in the Courthouse—jurors, criminal defendants, subpoenaed witnesses—are involuntarily exposed to the creche (ACLU Brief at 5-6). Legal compulsion to attend court, however, is far different from compulsion to adhere to a particular set of religious beliefs or even to view the nativity scene. Not only are all visitors to the Courthouse entirely free to avoid any contact with the Christmas display, but the record shows that 90 to 95 percent of the people who come to the Allegheny County Courthouse never pass by the main staircase and therefore never see the creche (J.A. 185).

In fact, not only is avoidance of the Pittsburgh displays possible, it is far easier than avoidance of the Pawtucket display upheld in *Lynch*. That display was in a main downtown park close to both the commercial and governmental centers of the City. By contrast, the display in the Courthouse is not visible to any passer-by outside the Building, and even the majority of persons who actually enter the building do not see the display.

Similarly, because the City-County Building has several entrances, it is also possible to avoid the menorah (J.A. 194). These facts distinguish this case from *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), and other similar cases, which have invalidated municipal displays of a cross that were so prominent as to dominate an entire community and virtually compel attention to be paid.

Respondents argue that petitioners' position "lacks any limiting principle" and, if accepted, would permit the conduct of a Christmas Mass within the Courthouse (ACLU Brief at 11, 17). This argument presupposes that such a religious service would not be permitted under the Establishment Clause, a proposition that is far from self-evident. *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981). Certainly, this Court has never held that a voluntary, non-coercive religious service conducted on public property as part of an overall holiday celebration would violate the First Amendment. In any event, the very "threat" that respondents contend is posed here was also raised as a ground for disapproving the nativity scene in *Lynch*, and the argument was rejected. *See* 465 U.S. at 710 (dissenting opinion). This is nothing more than an attempt to reargue *Lynch*. It does not distinguish this case from *Lynch* in any way whatever.

2. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT RECOGNITION OF THE RELIGIOUS ORIGINS OF SECULAR HOLIDAYS.

Even if this Court rejects the argument that the non-coercive nature of the government displays by itself defeats respondents' Establishment Clause challenge, the holiday displays at issue here are nevertheless permissible because they at most acknowledge religion; they do not "establish" or endorse religion generally or any one faith in particular. This Court recognized in *Lynch* that "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. at 674.

Respondents seek to force the government to ignore the historical and cultural role that religion plays in the lives of Americans and to bar any official recognition of the religious origins of Christmas and Chanukah. This the Establishment Clause does not require.

The principal governmental acknowledgment of the religious origin of Christmas is, after all, the well-established recognition of the day as a public holiday. The name of the holiday itself, derived from the phrase "Christ's Mass," reflects the holiday's religious background. Nevertheless, no party challenges the recognition of Christmas, so named, as a public holiday, and no party contends that the use of public funds to pay public employees for the holiday establishes Christianity as a state-approved religion.

In light of these undeniable facts, it is difficult to see how the challenged holiday displays can present any serious constitutional problem. This Court has held that acknowledgment of the religious, historical foundation of a secular holiday through the use of symbols is not the same as an endorsement of religion. *Lynch v. Donnelly*, *supra*, 465 U.S. at 680, 685. The Constitution does not prohibit the display of symbols, even symbols that contain a religious element. The fact that symbols with religious connotations may offend or upset some people does not make a display unconstitutional. *ACLU v. City of Birmingham*, 791 F.2d 1561, 1572 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986) (dissenting opinion) ("not everything that gives offense in this world is unconstitutional"); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) (dissenting opinion) ("insult without injury is not even enough to create a case or controversy"), citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). As the Court said about the nativity scene challenged in *Lynch*, "any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed." 465 U.S. at 686.

Of course, the religious origins depicted by the creche and menorah may cause some observers to reflect on the continuing religious elements of the holiday season. This may, in some minor way, benefit religion. Indeed, the Court in *Lynch* assumed, for the sake of argument, that the creche in Pawtucket advanced religion "in a sense." 465 U.S. at 683. The Court recognized, however, that any such benefit would be, at most, indirect, remote, and incidental, and the Court held that governmental action conferring such a benefit on religion does not thereby violate the Establishment Clause. *Id.*

In *Everson v. Board of Education*, *supra*, 330 U.S. at 16, this Court repeated, with apparent approval, Jefferson's statement that the Establishment Clause "was intended to erect 'a wall of separation between church and state.'" But the "wall of separation" metaphor was not then, and clearly is not now, an accurate description of this Court's rulings. The Court has sustained, against Establishment Clause challenges, opening legislative sessions with a prayer by a state-paid chaplain, *Marsh v. Chambers*, 463 U.S. 783 (1983); public school "released time" programs for religious training, *Zorach v. Clauson*, 343 U.S. 306 (1952); expenditures of public money for textbooks provided to students of church-sponsored schools, *Board of Education v. Allen*, 392 U.S. 236 (1968); use of federal monies for the construction of buildings used exclusively for secular purposes at church-sponsored colleges that combine secular and religious education, *Tilton v. Richardson*, 403 U.S. 672 (1971); tax exemptions for church property, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); and the establishment of Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961). The holiday displays at issue here do not advance or endorse religion to any greater degree than these constitutionally permissible governmental actions.

3. RESPONDENTS HAVE MISCONSTRUED *LYNCH* AND ITS APPLICATION TO THIS CASE.

a. The Proper Context for Analysis of the Displays Is the Context of the Holiday Season.

Respondents and the amici supporting them erroneously argue that the holiday displays here at issue are constitutionally distinguishable from the display approved in *Lynch* because the displays here are not surrounded by purely secular objects such as reindeer, candy-striped poles, and a talking wishing-well. Respondents argue that it is the additional secular items that establish the context within which the creche may be perceived and understood as part of a secular holiday (ACLU Brief at 15-16). But *Lynch* did not identify the physical context of the display as the proper focus for constitutional analysis. The Court in *Lynch* specifically held that the critical constitutional focus was on the creche "in the context of the Christmas season." 465 U.S. at 679. As Justice O'Connor wrote in her concurring opinion, it is "the overall holiday setting [that] changes what viewers may fairly understand to be the purpose of the display." *Id.* at 692. Both the Court's opinion and the concurring opinion thus recognized that it is the holiday context, not the proximity of secular items, that supports the public display of a nativity scene.

Contrary to respondents' arguments, secular items such as talking wishing-wells are simply not "constitutionally necessary." *American Jewish Congress v. City of Chicago*, *supra*, 827 F.2d at 130 (dissenting opinion). When properly considered within the context of the overall holiday season, petitioners' displays, like that in *Lynch*, merely recognize the secular celebrations of the season and do not have the principal effect of advancing religion.

In any event, respondents misstate the facts when they allege that the holiday displays at issue here are "purely religious and undiluted" (ACLU Brief at 10). Respondents' own exhibits show, in living color, that the creche in the Allegheny County Courthouse is surrounded by secular items such as poinsettia plants, decorated Christmas trees, and wreaths (J.E.V. 6-8).[1] The creche occupies less than one-half of the space devoted to the overall display. A frequent addition to the display is musical programs presented by high school and other local groups. The groups perform secular and religious Christmas carols and popular songs. During the holiday season, musical programs are presented on the main staircase of the Courthouse every weekday during the lunch hour (J.A. 158). Frequently, two or more groups perform in a single day (J.E.V. 28). The entire display, including the creche, poinsettia plants, evergreen trees, wreaths, and choral programs, is intended to celebrate the holiday season and to express holiday wishes of peace and good will. The choral segment of the display is specially dedicated to world peace and brotherhood and to prisoners and those missing in action in the Vietnam War (J.A. 160).

Similarly, the menorah is part of a larger secular display. The 18-foot menorah is dwarfed by a 45-foot decorated Christmas tree and surrounded by secular items such as signs for the United Way and a local flower display. Pet. App. 12a-13a.[2] The district court correctly found that "the creche was but a part of the holiday decoration of the stairwell and a foreground for the high school choirs which entertained each day at noon. . . . [I]f there was any religious significance to the menorah it was but an insignificant part of another holiday display." Pet. App. 4a. Accordingly, petitioners'

[1] "J.E.V." refers to the Joint Exhibit Volume filed in this Court.

[2] "Pet. App." refers to the appendix to the petition in No. 87-2050, filed by petitioner County of Allegheny.

displays would be permissible even under the narrow interpretation of *Lynch* advocated by respondents.

b. There Is No Constitutionally Significant Distinction between a Display Placed in a Private Park with Obvious and Extensive Government Involvement and a Display within, or in Front of, a Public Building.

Respondents also seek to distinguish *Lynch* from this case because, while the Pawtucket creche stood on private property, the Pittsburgh creche and menorah occupy government property. Again, respondents find constitutional distinctions where none exist. The creche in Pawtucket was officially sponsored to a degree not approached by the governmental involvement of the County of Allegheny and the City of Pittsburgh. In *Lynch*, the city owned, erected, and dismantled the creche. 465 U.S. at 671. Each year, the mayor of Pawtucket arranged and oversaw the details of the display. In fact,

> [w]hen the Hodgson Park display is opened, ceremonies at the Park are held in conjunction with City Hall, 300 feet away. Santa arrives at the Park in a City fire truck. He and the Mayor throw a switch, illuminating the lights at the Park and City Hall. . . .

Donnelly v. Lynch, 526 F. Supp. 1150, 1156 (D.R.I. 1981). The Court recognized that these actions closely identified the City with the creche display. Indeed, it was the City's involvement that raised a First Amendment issue in the first place. Had it not been for the City's clear identification with the Pawtucket display, no constitutional issue would have been presented. In upholding the City's involvement, the Court observed that the display "is essentially like those to be found in hundreds of towns or cities across the nation—*often on public grounds*—during the Christmas season." 465 U.S. at 671 (emphasis supplied). Ownership of the park was irrelevant to the analysis of *Lynch* and it is irrelevant here.

The Seventh Circuit, which decided *City of Chicago*, recently upheld the constitutionality of a holiday display located on a village hall lawn. *Mather v. Village of Mundelein*, No. 88-3226 (7th Cir. Jan. 4, 1989) (per curiam).[3] The court in *Mather* found that "the display in Mundelein leads viewers to focus on the village hall more than the display in Pawtucket did; the display in Mundelein is in the shadow of the [village hall] building, which serves as backdrop." *Id.*, slip op. at 4. Nevertheless, the court of appeals rejected the argument that placement of the display on the lawn of the village hall distinguished the case from *Lynch*. The court noted that "[d]etails that would be important to interior decorators do not spell the difference between constitutionality and unconstitutionality." *Id.*

Similarly unconvincing is respondents' argument that the seasonal displays in this case are unconstitutional because of their location at buildings that house "core functions" of government (ACLU Brief at 10). Relying on recent cases that sought to limit *Lynch* narrowly to its precise facts, respondents argue that placement of the displays in front of or inside government buildings somehow automatically involves a First Amendment violation. *See American Jewish Congress v. City of Chicago, supra*, 827 F.2d at 126; *ACLU v. City of Birmingham, supra*, 791 F.2d at 1566.

Ir. *Lynch*, the Court mentioned the park setting of the Pawtucket creche only once, during a brief factual recitation in the first paragraph of the first page of the 19-page majority opinion. 465 U.S. at 671. Yet, respondents argue that the physical placement of the display was so central to the Court's analysis that move-

[3] A copy of the *Mather* opinion has been lodged with the Clerk of the Court. In addition, on January 26, 1989, the California Second District Court of Appeal sustained the display of a menorah in the rotunda of the Los Angeles city hall. *Okrand v. City of Los Angeles*, No. B026035 (Cal. Ct. App. Jan. 26, 1989). A copy of the opinion in *Okrand* has also been lodged with the Clerk of the Court.

ment of the creche to the grounds of a public building distinguishes this case from *Lynch* and changes the proper result. Once again, respondents misconstrue *Lynch* and ignore its holding that it is the context of the Christmas season that controls, rather than the precise physical location of the display. *Id.* at 679.

Moreover, respondents' suggestion that challenges to holiday displays should be decided on the basis of whether the display is located at buildings that house the "core functions of government" is impracticable. Such a holding would require lower courts to determine whether or not a building is devoted to such core governmental functions. After reviewing, in another context, years of attempts by the federal courts to make constitutional distinctions based on whether a particular governmental function is core or "integral," this Court held that such an approach is "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985) (striking down use of functional standard to grant states immunity from federal regulations under the Commerce Clause).

4. RESPONDENTS HAVE MISCHARACTERIZED BASIC FACTS ABOUT THE NATIVITY SCENE.

In addition to the factual and legal errors discussed above, respondents' briefs contain several factual inaccuracies, which we address briefly here to avoid any possible misimpression.

a. The nativity scene in the Allegheny County Courthouse has never been arranged or displayed "in an altar-like setting," nor has it ever been used for worship or as an altar (ACLU Brief at 4, 7). Respondents' assertions to the contrary apparently refer to one occasion during the 1970's when photographs of Americans missing in action in the Vietnam War were posted in an area separate from, and in front of, the creche (J.A. 188-190). Although prayers were apparently offered on that occa-

sion, the holiday display was not used, then or at any other time, as a setting for worship.

b. Father Yurko of the Holy Name Society has never been "retained" to serve as a "consultant" to Allegheny County nor does he have complete control over the County's Christmas display (ACLU Brief at 22). Father Yurko's role is strictly confined to the assembly, display, and arrangement of the creche (J.A. 165). He is not involved with the planning, display, or arrangement of the overall Christmas display (J.A. 199), or with the coordination and planning of the choral program (J.A. 157, 178).

c. Respondents and their amici present arguments based on the alleged motivation of the Holy Name Society in donating the nativity scene to the County of Allegheny (ACLU Brief at 22; American Jewish Congress Brief at 18; American Jewish Committee Brief at 24). No evidence was presented as to the motivation for the donation. Accordingly, the arguments of respondents and their amici are wholly speculative.

d. The main staircase of the Allegheny County Courthouse has been used, from time to time, for events and programs other than the Christmas holiday display (J.A. 176). Moreover, although the staircase itself is not a gallery, the staircase begins in a large area that is used throughout the year for art displays and other civic and cultural events (J.A. 163, 167, 176).

5. THE "EQUAL TREATMENT" AND PUBLIC FORUM ARGUMENTS RAISED BY CHABAD ARE NOT PROPERLY BEFORE THIS COURT.

Petitioner Chabad seeks to use this case as a vehicle to establish an affirmative right of religious groups to include their symbols in public holiday displays (Chabad Brief at 27). Likewise, Chabad now argues (*id.* at 30), the steps of the City-County Building are a "public

forum" and therefore Chabad was affirmatively entitled to display its menorah there. Neither of these arguments is properly in the case, and neither was the subject of any proceedings below. No evidence was presented on either issue in the district court, and neither the district court nor the court of appeals addressed itself to Chabad's contentions. Although the second question presented in Chabad's petition purports to raise the issue of Chabad's entitlement to display a menorah, the simple fact is that the City of Pittsburgh voluntarily permitted the menorah to be included in the City's holiday display and Chabad therefore can make no claim against the City. Any questions regarding Chabad's asserted right to add a menorah to a public holiday display or regarding the alleged "public forum" status of the steps of the City-County Building can and should await resolution in a case where those issues are properly presented and where an adequate evidentiary record has been developed in the courts below.

6. CONCLUSION

The historical basis of the Establishment Clause and recent opinions of this Court show that the passive, noncoercive holiday displays exhibited by petitioners, taken in the context of the overall holiday setting, do not constitute a violation of the Establishment Clause. This case is not distinguishable from *Lynch* in any constitutionally significant way. Like the display in Pawtucket, the Pittsburgh displays are

> no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

Lynch v. Donnelly, supra, 465 U.S. at 683 (citations omitted).

For all the foregoing reasons, as well as the reasons stated in the opening briefs of petitioners County of Allegheny and City of Pittsburgh, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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